

1992

F.M. Electric Company v. Ralph L. Wadsworth Construction : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 920781

IN THE COURT OF APPEALS OF THE STATE OF UTAH

F.M. ELECTRIC COMPANY	:	
Plaintiff/Appellant,	:	Case No. 920781
vs.	:	Priority 16
RALPH L. WADSWORTH CONSTRUCTION	:	
COMPANY, McNEIL CONSTRUCTION	:	
COMPANY, and AMERICAN CASUALTY	:	
OF READING, PA.,	:	
Defendants/Appellees.	:	

BRIEF OF APPELLEES
McNEIL AND AMERICAN CASUALTY

Appeal from a Final Summary Judgment
of the First Judicial Circuit Court of Box Elder County,
The Honorable W. Daines Presiding

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FILED
Utah Court of Appeals

APR 22 1993


Mary T. Noonan
Clerk of the Court

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TABLE OF AUTHORITIES

Cases

McNeil incorporates herein by reference thereto the cases cited in the "Table of Authorities" section of the Brief of Appellee Wadsworth's.

JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann @78-2a-3(2)(j).

ISSUES ON APPEAL

1. Whether Paragraph 8 and Schedule B of the Subcontract make payment to F.M. Electric due on the 10th day of the month following payment by UDOT to Wadsworth.¹

2. Whether or not the award of attorneys fees to Wadsworth, McNeil and American Casualty was appropriate under Rule 11,. U.R. Civ. P.

3. Whether appellant is entitled to an award of attorneys fees under Rule 11, U.R. Civ. P.

4. Whether the Court's summary judgment and award of attorneys fees was justified because F.M. Electric named McNeil as a defendant even though McNeil was not a party to its contract with Wadsworth.

¹ Wadsworth and McNeil contend that this issue is moot inasmuch as final payment, with interest, was made by Wadsworth to F.M. Electric on June 232, 1992. F.M. Electric Brief, page 14, n1. See also R. 281-83; Appendix 2 to Wadsworth Brief. Since F.M. Electric admits that it has received final payment, with interest, this issue as to when payment was due under the subcontract is moot and academic. It is axiomatic under that "the Courts are not a forum for hearing academic contentions or rendering advisory opinions". Baird v. State, 574 P.2d 713, 715 (Utah 1978); Backman v. Salt Lake County, 13 Utah 2d 412, 417, 375 P.2d 756 (1962).

STANDARD OF REVIEW:

Since no evidence of any genuine issue of material fact was presented below, this Court reviews the trial court's decision for correctness as a matter of law. Seftel v. Capital City Bank, 767 P.2d 941 (UTAH App. 1989).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, & RULES

There are no determinative constitutional provisions, statutes, ordinances or rules relative to the issues in this case. McNeil joins Wadsworth in submitting that the case authorities referenced by F.M. Electric are not dispositive and are distinguishable both factually and legally. The legal authorities relied upon by Wadsworth are discussed in the argument section of Wadsworth's Brief.

STATEMENT OF THE CASE

Nature of the Case:

This is an appeal by plaintiff F.M. Electric Company from a Summary Judgment entered by the Circuit Court in favor of Defendants Ralph L. Wadsworth Construction Company, McNeil Construction Company and American Casualty of Reading, PA.

Course of Proceedings and Disposition by Trial Court:

McNeil incorporates herein by reference thereto Wadsworth's "Course of Proceedings and Disposition by Trial Court". McNeil adds thereto it comment that McNeil was not a party to the Wadsworth-F.M. Electric subcontract. R.42; Appendix 2 to Wadsworth Brief.

STATEMENT OF FACTS

McNeil incorporates herein by reference thereto Wadsworth's "Statement of facts", with the following addition thereto:

16. McNeil was not a party to the subcontract between Wadsworth and McNeil, which subcontract is the subject of the lawsuit and appeal. That subcontract was between Wadsworth and F.M. Electric. R. 42-45, Appendix to F.M. Electric Brief.

SUMMARY OF ARGUMENT

The plain and ordinary meaning of the Subcontract Agreement between Wadsworth and F.M. Electric is that payment from Wadsworth to F.M. Electric was due ten days after Wadsworth received payment of such work from UDOT.² The Subcontract Agreement contains no language whatsoever relative to the arguments by F.M. Electric that payment be made within "a reasonable time" after completion of the work or "upon" completion of the work. The contract unambiguously and expressly states that payment to F.M. Electric was "to be made as payments are received by" Wadsworth from UDOT and "payment shall be due on the tenth day of the month following payment to the prime contract". R. 95, 99, Appendix 1 to Wadsworth Brief. F.M.

² Wadsworth and McNeil maintain that the issue of when payment was due under the contract is moot in view of the fact that Wadsworth made final payment to F.M. Electric, with interest, on June 23, 1992. The Court should not rule on such matters which are moot, academic and merely advisory.

Electric seeks to have this Court rewrite the Subcontract provisions regarding payment and interpret the contract contrary to the plain meaning of its terms.

The award of attorney fees to defendants was proper under Rule 11 of the Utah Rules of Civil Procedure and otherwise for several reasons. This action was filed by F.M. Electric for the apparent reason harrassing and coercing Wadsworth and McNeil in making payment which was otherwise not due. Although F.M. Electric did not dispute that the intent of the parties was that Wadsworth would make payment after it received payment from UDOT, F.M. Electric filed this action in an apparent attempt to pressure Wadsworth to pay early and McNeil to pay Wadsworth's debt. Mr. Montoya and F.M. Electric knew what the intent of the parties was under the Subcontract Agreement, that McNeil was not a party to the subcontract, and that there was no factual basis for this lawsuit. The vexatious purpose of F.M. Electric is evidenced in its pursuit of this matter long after receipt of full payment with interest.

The judgment of the Circuit Court dismissing the Complaint of F.M. Electric and awarding Wadsworth, McNeil and American Casualty their reasonable attorney should be affirmed and Wadsworth, McNeil and American Casualty should be awarded their reasonable attorney fees and costs incurred upon this appeal.

ARGUMENT

POINT I

THE SUBCONTRACT AGREEMENT BETWEEN WADSWORTH AND F.M. ELECTRIC CLEARLY AND UNAMBIGUOUSLY PROVIDES THAT PAYMENT WAS TO BE MADE TO F.M. ELECTRIC AS PAYMENTS WERE RECEIVED BY WADSWORTH FROM UDOT AND THAT PAYMENT WAS DUE ON THE TENTH DAY OF THE MONTH FOLLOWING PAYMENT TO WADSWORTH BY UDOT.

McNeil incorporates herein by reference thereto Wadsworth's Argument in Point I of Wadsworth's Brief.

POINT II

THE CIRCUIT COURT'S AWARD OF ATTORNEY FEES TO WADSWORTH, MCNEIL AND AMERICAN CASUALTY WAS PROPER AND APPROPRIATE

McNeil incorporates herein by reference thereto Wadsworth's Argument in Point II of Wadsworth's Brief, with the following addition thereto:

The Court's award of attorney fees to McNeil and to its bonding company, American Casualty of Reading Pa., is also particularly appropriate because McNeil was not a party to the subcontract between Wadsworth and F.M. Electric which is the subject of this lawsuit and appeal. That subcontract was between Wadsworth and F.M. Electric. R. 42-55, Appendix to F.M. Electric Brief.

CONCLUSION

The Subcontract unambiguously and expressly provides that payment to F.M. Electric was "to be made as payments are received by" Wadsworth from UDOT and that "payment shall be due on the tenth day of the month following payment to the prime contract". The subcontract contains none of the provisions F.M. Electric now

seeks to assert. The issues relating to when payment was due under the subcontract are moot in view of the fact that Wadsworth made final payment to F.M. Electric, with interest, on June 223, 1992.

The award of attorney fees to defendants was proper under Rule 11 of the Utah Rules of Civil; Procedure and there is no basis for awarding attorney fees to F.M. Electric.

The judgment of the Circuit Court dismissing the Complaint of F.M. Electric and awarding Wadsworth, McNeil and American Casualty Company their reasonable attorney fees should be affirmed and Wadsworth, McNeil and American Casualty should further be awarded their reasonable attorney fees and costs incurred on this appeal.

Dated this 22nd day of April, 1993,

BARKER LAW OFFICE

By: 
Ronald C. Barker

CERTIFICATE OF MAILING

I hereby certify that I caused a copy of the foregoing to be mailed, postage prepaid, on the 22nd day of April, 1993, to the following persons at the addresses indicated:

Robert Babcock, Esq. and Jeffrey R. Price. Esq., 254 West 400 South, Second Floor, Salt Lake City, Utah 84101.

Stanford P. Fitts, Esq., BEESLEY, FAIRCLOUGH, CANNON & FITTS, 40 East South Temple, Salt Lake City, Utah 84111


Ronald C. Barker

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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Plaintiff and Appelleant,

vs.

RALPH L. WADSWORTH CONSTRUCTION COMPANY, McNEIL
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Defendants and Appellees.

ADDENDUM TO BRIEF OF APPELLEES

Appeal From a Summary Judgment of the the Fourth Circuit Court,
in and for Box Elder lCounty, State of Utah, Civil Action
NO. 92000052 CV, Honorable Robert W. Daines, Circuit Judge

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McNeil incorporates herein by reference thereto the Addendum to Wadsworth's Brief.